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In the Supreme Court of the United States

DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, *ET AL.*,
Petitioners,

v.

LEROY CARHART, M.D.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF ON THE MERITS OF AMICUS CURIAE THE STATE OF TEXAS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Contents i

Index of Authorities ii

Interest of Amicus 2

Summary of the Argument 2

Argument 3

Conclusion 4

INDEX OF AUTHORITIES

CASES

Hardin v. State, 52 Tex. Crim. 238, 106 S.W. 352 (1907) 3

Roe v. Wade, 410 U.S. 113 (1973) 3

STATUTES

TEX. REV. CIV. STAT. art. 4512.5 2-3

OTHER AUTHORITIES

Op. Tex. Att'y Gen. No. H-369 (1974) 3

Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioner 2-3

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This case presents the question of whether Nebraska's "partial birth abortion" statute creates an undue burden on the right to abortion. For the reasons that follow, amicus believes that this statute is constitutional and urges the Court to reverse the Eighth Circuit's judgment to the contrary.

INTEREST OF AMICUS

The State of Texas appears as amicus curiae and urges the Court to reverse the judgment of the Eighth Circuit. Although Texas does not have in place a statute prohibiting "partial birth abortions," Texas does have a "parturition" statute which prevents the killing of a child during birth if that child otherwise would have been born alive. *See* TEX. REV. CIV. STAT. art. 4512.5. The States of Louisiana and Mississippi are filing an amicus brief supporting Petitioner on the merits arguing that Nebraska's statute is not actually a statute regulating abortion but is, rather, a statute prohibiting the killing of a child during birth like Texas's parturition statute. Because its parturition statute has been brought into this debate, Texas has a substantial interest in the disposition of this case.

SUMMARY OF THE ARGUMENT

For more than one hundred years Texas has had a parturition statute in place that prohibits the killing of a child during birth. The States of Louisiana and Mississippi are filing an amicus curiae brief arguing that the Nebraska statute prohibiting partial birth abortions is not actually a statute regulating abortion, but is instead more related to a parturition statute that prevents the killing of a child during birth. Texas adopts and endorses the arguments made by Louisiana and Mississippi, and urges the Court to reverse the judgment of the Eighth Circuit.

ARGUMENT

Texas's parturition statute provides:

> "Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years." TEX. REV. CIV. STAT. art. 4512.5.

This statute existed when the Court considered *Roe v. Wade*, 410 U.S. 113 (1973), and it was not invalidated by that opinion. *See id.* at 117 n.1 (noting that article 4512.5, formerly article 1195, had not been challenged by Roe). Texas law has long-recognized that article 4512.5 "is not, in truth, an abortion statute," but is instead "a prohibition of a crime of its very precise definition." Op. Tex. Att'y Gen. No. H-369 at 3 (1974)[1] (citing *Hardin v. State*, 52 Tex. Crim. 238, 238, 106 S.W. 352, 353 (1907)). That distinction was noted at the reargument of *Roe*, when Justice Marshall noted that killing a child in the process of childbirth was "not an abortion." *See* Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioner, Appendix A at 3 (transcription of the second argument of *Roe*).

Although Texas has not enacted a statute specifically prohibiting "partial birth abortions" as have Louisiana and Mississippi, Texas agrees with and endorses the arguments made by those states in interpreting article 4512.5 as set forth in their amicus brief on the merits.

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1. Texas Attorney General Opinions can be obtained from the Texas Attorney General's website, which is located at http://www.oag.state.tx.us.

CONCLUSION

For these reasons, and those set out in the Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioner, Texas respectfully requests that the Court reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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